



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

WJH: BAN
Docket No. 06030-09
6 January 2010

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD ICO [REDACTED]

Ref: (a) Title 10 U.S.C. 1552

- Encl:
- (1) DD Form 149 w/attachments
 - (2) NPC memo 1430 Ser 811/515 of 24 Jul 09
 - (3) Commanding Officer, Navy Operational Support Center Norfolk, ltr 1000 Ser N00/3386 of 7 Nov 09
 - (4) NAVADMIN 349/07
 - (5) BUPERSINST 1430.16F, Chapter 2, Eligibility Requirements Excerpts
 - (6) Evaluations from March 2006 to March 2009
 - (7) Standard Form 600, Chronological Record of Medical Care ltr of 30 May 08
 - (8) Officer in Charge Strike Fighter Wing Atlantic Detachment AIMD Oceana ltr 1420 40 of 30 May 08
 - (9) NAVPERS 1070/613 of 10 Jun 08 and related documents
 - (10) [REDACTED] (NETPDT) e-mail of 18 Sep 2009
 - (11) BUPERSINST 1430.16F, para 710 "Frocking of Enlisted Personnel" and MILPERSMAN 1420-060
 - (12) [REDACTED] (NPC) e-mail of 9 Nov 2009
 - (13) Service Record and evaluations

1. Pursuant to the provisions of reference (a) Subject, hereinafter referred to as Petitioner, filed enclosure 1 with this Board requesting, in effect, that the applicable naval record be corrected to show that she was advanced to E-6/AT1 as a result of the March 2008, Navy-wide advancement cycle (Cycle 199).

2. The Board, consisting of Messrs. Pfeiffer, Zsalman, and George, reviewed Petitioner's allegations of error and injustice on 9 November 2009 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies. The Board also considered advisory opinions furnished by the Navy Personnel Command and the Commanding Officer Navy Operational Support Center (NOSC) Norfolk, Virginia attached as enclosures 2 and 3 that recommended no relief be granted.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner is an Aviation Electronics Technician Second Class. She was advanced to her present rank in September 1998.

c. In July 2002, Petitioner arrived at the Aircraft Intermediate Maintenance Depot (AIMD) Oceana VA¹ for duty under Permanent Change of Station orders.

d. In May 2003, Petitioner received orders transferring her to the Navy Operational Support Center (NOSC), Norfolk, Virginia. Because Petitioner was living in base housing at Oceana, had a dependent child enrolled in child care in Oceana and had professional rating skills that could be exercised at the AIMD Oceana, she was authorized by the NOSC Norfolk to remain in Oceana and perform her military duties at the AIMD Oceana in spite of the transfer orders. No "temporary" or "permanent" orders were issued for this arrangement.

e. Physical Fitness Assessment (PFA) records show the following:

Spring 2004, Fall 2004 and the Spring 2005 PFA's: Petitioner was medically waived from both the Body Composition Assessment (BCA) and the Physical Readiness Test (PRT).

Fall 2005 PFA: Petitioner successfully met the overall PFA standards. She participated in all parts of the PFA except for the "Cardio" category of the PRT for which she was medically waived.

Spring 2006 PFA: Petitioner failed to meet overall PFA standards because she failed to meet the BCA standards. She was medically waived from participation in all parts of the PRT (exercise portion).

Fall 2006 PFA: Petitioner successfully met the overall PFA standards. She successfully met the BCA standards and was medically waived from participation in all parts of the PRT (exercise portion). See enclosure 1.

f. From March 2007 to September 2007, Petitioner was placed on limited duty due to bursitis, knee pain, hip pain and chronic fatigue. Her limited duty was extended from September 2007 to March 2008. Shortly thereafter, a Medical Board was initiated that ultimately determined in June 2008 that she was "Fit to Continue Active Duty". However, a subsequent medical assessment screening performed by the Navy Medical Center Portsmouth found the following limitations: "No

¹ Due to command reorganizations and redesignations, the Aircraft Intermediate Maintenance Depot (AIMD) Oceana VA is also referred to in Petitioner's application as the Fleet Readiness Center (FRC) Oceana, Virginia.

shipboard duty, No overseas billets, No mandatory PT, No running, no semi-annual PRT. May exercise at own pace." See enclosure 1.

g. Physical Fitness Assessment (PFA) records also show the following:

Spring 2007 and Fall 2007 PFAs: Petitioner successfully met the overall PFA standards. Petitioner met the BCA standards and was medically waived from participation in the PRT (exercise portion).

h. NAVADMIN 349-07 announced the March 2008 (Cycle 199) Navy wide Petty Officer advancement examinations for E-4 through E-6. In order to be eligible to participate in the cycle, candidates were required to meet all eligibility requirements by 1 February 2008. See enclosure 4.

i. On 1 February 2008, Petitioner met all eligibility requirements to participate in the advancement cycle. She had the minimum required time in grade.² Her most recent evaluation (ending 15 March 2007 "recommended" her for retention and included a promotion recommendation of "must promote."³ Also, although she was on limited duty at the time, per BUPERSINST 1430.16F, "Personnel in a LIMDU status may participate for advancement in rate if otherwise qualified" provided their condition is not a result of their own misconduct. See enclosures 5 and 6.

j. Petitioner participated in the E-6/AT1 Navy-wide advancement exam which was administered on 6 March 2008.

k. On 17 March 2008, her reporting senior signed her next annual evaluation which reported on her performance from 16 March 2007 to 15 March 2008. He "recommended" Petitioner for retention and gave a promotion recommendation of "early promote." See enclosure 6.

l. The results of the E-6/AT1 advancement examination were published on 19 March 2008. Petitioner was selected for advancement.

m. Petitioner's command conducted their Spring 2008 PFA on 28 and 29 May 2008. On 28 May 2008, Petitioner failed to meet the overall PFA standards because she failed to meet the BCA standards. She was medically waived from participation in the PRT (exercise) portion of the PFA.⁴ See enclosures 1 and 3.

² She had been an E-5/AT2 since September 1998.

³ Her next evaluation which reported on her performance from 16 March 2007 to 15 March 2008 also "recommended" Petitioner for retention and included an even "higher" promotion recommendation of "early promote."

⁴ Note, for reasons that will become apparent, Petitioner argues that she should be considered medically waived from the BCA portion of this PFA as well.

n. On 30 May 2008, two days after failing the BCA portion of the PFA, Petitioner received another medical waiver. This waiver was based on a diagnosis of hypothyroidism. It was effective for the period 30 May 2008 to 1 October 2008 and included a waiver of the BCA portion of the PFA. See enclosure 7. Petitioner argues that this waiver should be considered retroactive (by two days) to excuse the recent 28 May 2008 BCA failure.

o. On 2 June 2008, the Officer in Charge, Strike Fighter Wing Atlantic DET AIMD Oceana, [REDACTED] "frocked" ⁵ Petitioner to E-6/AT1 (apparently excusing the tardiness of the 30 May 2008 BCA waiver and giving it retroactive effect). See enclosure 8. However, on 12 June 2008, Petitioner's "parent" command (the Navy Operational Support Center, Norfolk, Virginia) countermanded the OIC's determinations and declined to give retroactive effect to the 30 May 2008 BCA waiver.⁶

p. On 10 June 2008, Petitioner was advised that her scheduled advancement would be withheld. She was issued a NAVPERS 1070/613 Administrative Remarks (Page 13) entry memorializing that determination. Additionally, the command sent a message to the Naval Education and Training Professional Development and Technology Center (NETPDTC) (Code N321) with an information copy to NAVPERSCOM (PERS 811/812) withholding the advancement and advising that a required Page 13 entry has been made. See enclosure 9.

q. On 14 November 2008, as directed, Petitioner requested transfer to the Fleet Reserve to be effective at her "High Year Tenure" date of April/May 2010. Petitioner's request was granted and she is scheduled to be transferred to the Fleet Reserve effective 30 April 2010. See enclosures 1 and 3.⁷

r. Petitioner's advancement was not reinstated before the limiting date of 31 December 2008. See enclosure 3.

⁵ Frocking is an administrative authorization to assume the title and wear the uniform of the higher pay grade before the advancement is actually effective. Petitioner's advancement was not scheduled to be effective until 16 October 2009.

⁶ Governing regulations provide that prior to the PFA, PRT assessment sheets are provided to the entire command. Sailors who disclose medical conditions that may interfere with their ability to pass the PFA are required to be evaluated by a medical professional. There is no evidence that Petitioner's hypothyroidism was evaluated by a medical professional for PFA purposes before the BCA. PRT/BCA waivers should not be accepted after the date of the PFA/PRT/BCA.

⁷ Petitioner has given this Board assurances that, if her request for a retroactive advancement is approved, she is not contemplating any future request or application to extend her active service beyond her Fleet Reserve transfer date of 30 April 2010. This is an important factor that influenced the Board towards leniency.

s. Just before the limiting date, on 28 and 29 December 2008, Petitioner met with her Command Master Chief and her commanding officer. She was advised that "because she was clearly not within standards and her Fleet Reserve (request) was approved, she was no longer eligible for advancement." See enclosure 3.

t. In March 2009, Petitioner participated in the March 2009 advancement cycle. She also underwent surgery and was on convalescent leave from 17 March 2009 to 30 April 2009. Upon return, she learned that her March 2009 exam had been invalidated due to "PRT failure and pending retirement date." See enclosure 1.

u. On 1 April 2009, her reporting senior signed her evaluation which reported on her performance from 16 March 2008 to 15 March 2009. The reporting senior "recommended" Petitioner for retention and gave a promotion recommendation of "must promote." See enclosure 6.

v. On 5 June 2009, Petitioner filed enclosure 1 with this Board requesting that the applicable naval record be corrected to show advancement to E-6/AT1 from the March 2008, Navy-wide advancement exam, Cycle 199. Petitioner argues, essentially, that based on the totality of the circumstances, the BCA waiver of 30 May 2008 should be given retroactive effect. Her local command was well aware that she had been on extended limited duty due to health problems and that she had received multiple PFA waivers in the time leading up to the Spring 2008 PFA. And although her "limited duty" period had expired, the "medical board" assessment process had already begun by the time of the BCA measurement on 28 May 2009. After the BCA measurement, she made a medical appointment as soon as possible and was found to be suffering from hypothyroidism. It is reasonable to conclude that her medical condition predated her diagnosis by at least two days. Moreover, her OIC determined that her diagnosis and BCA waiver, though two days tardy, was nevertheless sufficient to excuse her BCA failure as evidenced by his decision to "frock" her. Additionally, Petitioner claims that her "frocking" was not removed in accordance with the governing instructions and that she was not provided with assistance and opportunity to comply with the BCA standards before the limiting date. She also claims that the reasons cited for invalidating the March 2009 exam ("PRT failure and pending retirement date") were erroneous.

w. By enclosure 3, Petitioner's command has commented that no relief is warranted for the following reasons: Petitioner was not within BCA standards and did not have a valid BCA waiver before the Spring 2008 PFA cycle. The "waiver" issued two days after the BCA was tardy and is ineffective to excuse the BCA failure. Her advancement was properly withheld and she was properly notified. She should not have been "frocked" because her OIC lacked the authority to "frock" her. She was advised that she had until 31 December 2008 (the limiting date) to get within standards. She had adequate opportunity

and assistance to achieve that goal. However, she failed to meet the BCA standards before the limiting date. Also, her "local" command should not have allowed her to take the March 2009 exam because she still had not passed a PFA.

CONCLUSION:

Upon review and consideration of all the evidence of the record, the Board concludes that Petitioner's request warrants favorable action. The Board carefully considered the comments of the command to the effect that the 30 May 2008 BCA "waiver" was tardy and thus ineffective to excuse a BCA failure. However, the Board found that based on the totality of the circumstances, the interests of equity and justice demand that, as an exception to policy, the BCA waiver of 30 May 2008 should be given retroactive effect in this one particular instance. Petitioner's evaluations from March 2004 - March 2009 show that, despite her health and PFA issues, her performance was rated by her reporting senior as excellent and she was consistently recommended for retention. No evaluations during that period indicate any shortcomings in her performance that would disqualify her from advancement. In fact, the evaluations indicate just the opposite, namely, that her reporting seniors believed that she was a "must" or "early" promote. Additionally, although the BCA waiver was "tardy" (by two days), the Board also concluded that her medical condition (hyperthyroidism) very likely existed well before the BCA measurement on 28 May 2009. The Board recognized that Petitioner's "limited duty" period had expired in March 2008, but found that was mitigated by the evidence that the "medical board" assessment had already begun before the BCA measurement. Moreover, Petitioner's OIC, who had direct daily observation, excused her BCA failure as evidenced by his decision to "frock" her on 2 June 2008.

The Board noted that the procedures used by Petitioner's "parent" command to withhold the advancement were carried out in strict accordance with the governing regulations. Her command issued the required Page 13 entry and sent the required message to the Naval Education and Training Professional Development and Technology Center (NETPDTC) (Code N321) with an information copy to NAVPERSCOM (PERS 811/812). However, it appears the message was never received by NETPDTC. This resulted in some confusion because NETPDTC is still of the view that Petitioner should have been advanced as a result of the March 2008 cycle. See enclosure 10. And although the communication failure cannot be attributed to the command, the Board found that the confusion caused by this happenstance militated in favor of the Petitioner.

The Board was not persuaded by the Petitioner's argument that the procedures used to remove her "frocking" entitled her to relief. "Frocking" is not "advancement." Thus, in the Board's view, even if the "frocking" removal was erroneous, such error would have no impact

on the withholding of the "advancement." Likewise, Board was not persuaded by the Petitioner's argument that she should be entitled to relief because she was not provided with assistance and opportunity to comply with BCA standards before the limiting date. In the Board's view, Petitioner herself bears the lion's share of the responsibility for getting within standards and demonstrating that she is within standards (or waived).

Likewise, the Board was not persuaded by the command's argument that the OIC had no authority to "frock" the applicant. The governing instructions contemplate that OIC's with "By direction" authority may "frock" candidates and that the frocking is memorialized by effecting a Page 13 entry as was done in Petitioner's case. The command has not proffered any evidence, such as a limitation placed on Commander [REDACTED] "By direction" authority to substantiate their statement that the "FRC lacked the authority to frock [REDACTED] See enclosure 11.

The Board noted that there seems to be much debate and perhaps confusion over whether Petitioner's approved request to transfer to the Fleet Reserve disqualified her from participation in the March 2009 advancement cycle. Under the governing regulations, this limitation applies only to E6, E7 and E8 members. See paragraph 209 of the BUPERSINST 1430.16F in enclosure 5. Because Petitioner was an E-5, the limitation alone did not disqualify her. Thus, the fact that Petitioner had an approved request to transfer to the Fleet Reserve should not have served as a basis to invalidate her March 2009 exam. And the PSD Little Creek's action to invalidate Petitioner's March 2009 exam, in part, on that basis was error. See enclosure 12. And although the error was unrelated to the March 2008 advancement cycle, it is emblematic of the communication and documentation deficiencies that plague this case and militate in favor of granting relief.

For the reasons stated above, the Board concludes that the record should be corrected to show that Petitioner was advanced to E-6/AT1 from the March 2008, Navy-wide advancement exam, with an effective date of 16 October 2008 and a Time in Rate (TIR) date of 1 July 2008.

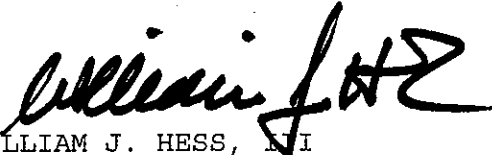
RECOMMENDATION:

That Petitioner's naval record be corrected, where appropriate, to show that:

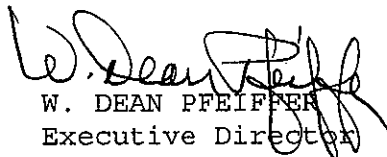
- a. Petitioner was advanced to E-6/AT1 from the March 2008, Navy-wide advancement exam, with an effective date of 16 October 2008 and a TIR date of 1 July 2008.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) it is certified that quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.


ROBERT D. ZSALMAN
Recorder


WILLIAM J. HESS, III
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.


W. DEAN PFEIFFER
Executive Director

Reviewed and approved:

 1/27/10
Assistant General Counsel
(Power and Reserve Affairs)